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JAMES WILSON AND HIS RELATION TO JURISPRUDENCE AND CONSTITUTIONAL LAW.¹

I count it an honor to be afforded the opportunity in this place, associated as it is with so many hallowed memories connected with our Nation's birth and growth, to offer the only tribute of gratitude which the living can give to the dead, a full and hearty acknowledgment of the great deeds done in the body.

As many of you do know, James Wilson is, in a peculiar sense, entitled to my veneration and affection. And yet I am fully sensible that it would not comport with the dignity and reputation of any of those connected with this great University, nor with my own spirit, to ascribe to him anything to which he is not entitled. Much less should it be our desire to enrich his fame by taking from another the credit of thought or deed to which he is entitled, or to say anything which might detract from the just fame or glory of any other.

While it is an unworthy motive to seek to enrich one at the expense of another, it is no less a reproach upon any people that any important act contributing to the advancement of the nation should go unnoticed, or that any great deed should be allowed to become obscured from the view of the general public. While it is true that the name and services of James Wilson are known, appreciated and acknowledged by a few scholars and publicists of this and other nations, it is likewise unfortunately true that his contributions to the cause of American liberty and constitutional law are wholly unknown to the mass of the citizens, and known only to a few of the profession of which he was a leader and bright ornament.

What is the true field of glory and what man is entitled to the love and reverence of his fellowmen and the gratitude of posterity? Is it he who, on the field of battle, overcomes

¹ An address delivered before the Law Department of the University of Pennsylvania.

an adversary? Yes, if he thereby arrests the advance of tyranny, or defends the cause of liberty, or, though defeated, plays the patriot's part.

"The touchstone of true worth is not success.

There is a highest test—

Though fate may darkly frown, onward to press,

And bravely do one's best."

Personal bravery in the heat of battle or turmoil of strife is not more courageous than to lift up the voice in protest against organized, established power. Nor yet are the victors on the famous fields of freedom more entitled to our admiration or gratitude than that company of heroes who, disregarding their own immediate sacrifice, put aside their safe and gainful occupations, and pledged their lives, their fortunes and their honor in order that liberty might not perish. In this particular, the American Revolution stands without a parallel. The gold of Macedon corrupted the heart of Greece, but such temptations could not seduce the patriotism of our fathers.

The obnoxious burdens imposed by Parliament were, at the insistence of Chatham, Burke and other friends of the colonists, removed; and the duties upon commerce were not larger than the colonists were willing to contribute to the crown, provided the impositions were made for proper purposes. They were not being impoverished. No hated king ravished their maids and matrons. A foreign Parliament declared its authority to legislate for the colonists as to all matters, and the crown, sanctioning this view, undertook to enforce the laws thus made, when the patriots of America, "sniffing from afar the tainted gale of tyranny," hurled back the defiance, "Parliament has no power to legislate for the colonies as to any matters whatsoever."

Words are things of mighty import, but ideas are the unseen forces which cause words and deeds to electrify the world. And he who declares and maintains a sentiment which rules the destinies of a people is as much entitled to glory as he who leads an army in battle victorious.

The glory and dominion of Alexander and of Cæsar diminished ere life's tide had ebbed. The ages but add to

the lustre of Demosthenes and Cicero. The ideas of Grecian and Roman philosophy animate the whole civilized world, and, operating by means of international and municipal law, are civilizing the world.

There are those who are wont to fix the turning-point in the tide of human destiny in this or in that great event, but who can know the design of Him who rules the destinies of men?

Clovis took his crown from God's anointed priest. The swelling strains of the *Te Deum* proclaimed that a new Empire arose on the ruins of the old. Martel repulsed the Moslem and saved Christianity. William overcame the Saxon and established feudalism in a liberty-loving land. The Barons at Runnimeade obtained the great charter. But was the true principle of liberty declared or established as the rule of action? All honor to the men of England and their pledge for all men, of due process of law; but it was left for the men of America to adopt as their rule of civil conduct the true principles of liberty as proclaimed in the Declaration of Independence. It was left for them to obtain individual liberty and erect impregnable barriers of justice. It was for them, in a time of profound peace, to erect a new government on these foundations.

The Democracies of Greece, the Republic of Rome, the constitution of Britain, were each in their turn the growth of centuries. The new American nation sprang Minerva-like from the Jovian brain of our fathers. It is remarkable that no new faculty has been given the nation. The boundaries of its domain have been extended, the extent of some of its powers has been defined, and, in one instance, the efforts of repudiation have succeeded in clipping the wings of justice. But as it was when it came from the minds of that wonderful council of statesmen known as the Federal Convention, so does it remain to-day, the prodigy of human achievement.

The part taken by James Wilson in this titanic struggle and this magnificent achievement is the theme which engages our attention; and while I have stated it as his connection with Jurisprudence and the American Constitution, it is not my purpose to use these phrases in a narrow or restricted

sense. The material at hand is so voluminous, the field to be traversed so wide, and the subjects so various, that the time allotted me will only permit that the principal matters be noticed, and that without embellishment, except as they are connected with and constitute a part of the most glorious achievements of the human intellect.

James Wilson was a pioneer in the field of Jurisprudence. He taught in this place, that as a science, Jurisprudence depends upon analysis and classification of subjects according to genera and species, thus applying the Aristotelian idea of science to the science of law and government. I need not pause to argue the justness of this proposition, but need only refer to the fact that Gaius, and Justinian after him, says that all our law relates to Persons, to Things and Actions, thus placing in formulæ the basic outline of legal analysis, and direct attention to the fact that these conceptions accord with the advanced ideas of the German jurists and are gradually obtaining recognition in England and America.

"Science," says Falck, "in the objective and universal meaning of the term, designates a body of connected truths methodically arranged. The sum of knowledge which is related to right and law practically constitutes the special Science of Jurisprudence."

Wilson expresses his zeal for a system of legal education, admonishes his hearers that it was only by attaining the vantage-ground of science that they could obtain a clear and comprehensive view of law and government. He expresses the value of a systematic plan, and in this again he agrees with the modern German idea of constructing a juristic encyclopædia which should form the skeleton and framework of their studies. Strikingly in accord with the views he expressed and exemplified a century ago, are the modern views of the celebrated German jurist, Ahrens:

The special study of Jurisprudence ought to begin with lectures on juristic encyclopædia and methodology unless a course on the philosophy of law take their place. Juristic encyclopædia, however, should not be dealt with after the older dry and barren method, but it ought to expound the fundamental conceptions of the science, and to exhibit the

connection of all its parts. The great advantage and even necessity of such an introductory course cannot be questioned by any one who understands the mental conditions involved in the introduction of the young student to a science that embraces many branches and covers a very extended field of knowledge. Any other view can be accounted for only by the fact that there is no recognition of a common principle and connection in all parts of the science, and that the special study of the law is only pursued as a learned trade. . . . In the arrangement of the study of the law, it ought to be held fast as a general and guiding principle, that jurisprudence is to be taught and learned on its three essential sides, as philosophic (theoretical), historical, and positive (practical) science, and that these three sides of the subject are not to be separated from each other.

He actually constructs an outline, and in its construction exhibits a knowledge of the best methods of legal architecture corresponding in principle and outline with the best efforts which have been accomplished abroad, and which are only just beginning to be appreciated in America.

The inquiry naturally suggests itself, what are the reasons and causes which led these men to agree? Nothing subtle, nothing peculiar; simply that they, though living in different lands and different ages, went to the same fountain of knowledge. The same principles of philosophy guided their inquiry; the same principles of legal analysis dominated the structural arrangement of their plans. And this fountain-head was the principles of Grecian philosophy practically applied to modern law.

Proceeding a step in the vast field of practical knowledge embraced within the orbit of Jurisprudence, we encounter the Law of Nature, which has its practical effect upon human action under what is known as the Law of Nations.

He repudiates entirely the idea of natural enemies, saying, "What immense treasures have been exhausted, what oceans of human blood have been shed, by force of the expression 'natural enemy!' 'Tis an unnatural expression. The antithesis is truly in the thought: for natural enmity forms no title in the genuine law of nations, part of the law of nature. It is adopted from a spurious code."

“In the law of England there is a distinction between two kinds of aliens—those who are friends, and those who are enemies. Among alien enemies a subdivision is made, or at least was made till lately, which must occasion some degree of astonishment. Alien enemies are distinguished into such as are temporary, and such as are perpetual. Nay, what is more; this line of distinction, certainly never drawn by the peaceful spirit of Christianity, is attempted to be marked by the progress of the Christian system. ‘All infidels,’—these are the expressions of my Lord Coke in the report of Calvin’s case—‘all infidels are perpetual enemies; the law presumes not that they will be converted; between them as with the devils, whose subjects they are, and the Christian, there is perpetual hostility; and can be no peace.’ ”

In common with the advanced thought of that age and of this, Wilson taught that the obligation not to violate the laws of humanity was the natural law of nations, and that these natural laws may govern and justify the actions of nations as well as of men, and he even sanctions the forceful application of them.

He appeals to those measures which are now commonly acknowledged as within the domain of the natural law of nations, REMONSTRANCE AND INTERVENTION, both as a right and a duty. Remonstrance and intervention, these are the answers to the cry of the oppressed. Peace is to be desired, but war is honorable, and peace is ignoble at the price of duty. Wilson says: “How beautiful and energetic are the sentiments of Cicero upon this subject. ‘It is more consonant to nature,’ that is, as he said a little before, to the law of nations, ‘to undertake the greatest labors, to undergo the severest trials, for the preservation and advantage of all nations, if such a thing could be accomplished, than to live in solitary repose, not only without pain, but surrounded with all the allurements of pleasure and wealth. Everyone of a good and great mind would prefer the first before the second situation in life.’ ”

International remonstrance and intervention are not new thoughts. The same spirit which filled the American mind has always animated the breast of Christendom. The drastic

letter of Cromwell to the Duke of Savoy arresting his hand in the midst of the terrible outrages against his subjects is a striking illustration: "On receiving intelligence of the awful condition of this most miserable people, it was impossible not to feel the deepest sorrow and compassion; for, we not only consider ourselves united to them by the ties of humanity, but those of the same religion. Feeling, therefore, that we should fail in our duty to God, to our brethren and to the religion which we profess, and should evince the want of brotherly love, if we were not deeply moved by a sense of their calamities, we declare that we feel it necessary to use *every means in our power* to obtain an alleviation of their unparalleled sufferings."

The solicitude felt for the oppressed Cubans was but the natural wellings of the human heart. Intervention on their behalf was but obedience to laws divinely implanted and recognized as the laws of nature, undefined and undefinable, but none the less powerful, and a recognized part of the Law of Nations.

Who regrets that our ancient policy of isolation is outgrown? Who can regret that in answer to a call not to be denied 10,000,000 of human beings who have never seen America look for the rising sun of their hope to this Mecca of human liberty, to which before them millions on millions of the oppressed have made the pilgrimage and found a land established on the principle that "all men's good is each man's rule."

The march of progress is never along the line of least resistance. Civilization must often "with reeking tube and far-flung battle-line" break down the barriers and make way for liberty. The blessings of peace, of education, of religion, of civilization, are not always appreciated and sought for.

And to those who stumble over the doctrine of "consent," let them but consider that as to all those people who come within the denomination civilized, they do consent to all the treaty provisions of the powers whose subjects they are, and as to all those who are yet half-savage aborigines, the traditions of our fathers, of all parties and persuasions, speak a uniform sentiment, they are under the pupilage of the power which has dominion over the land. Strong is the "crimson

cord of kinship," but of one blood are all the nations of the world. In a proper sense we are our brothers' keepers.

From a broader view there is nothing unnatural that in the progress of civilization the half-savage aborigines must make way for the new generations. What are men or nations in the great scheme of human progress? The ruins of Karnak and of the Aztec, the secrets of the Pyramids and the cuneiforms of ancient East show us that nations, like men, pass away. No, there is no wrong in crowding to narrow limits the savage inhabitants of the islands of the sea. Lift them up, educate them if we may, give them the light of truth if we can, but neither they nor we can arrest the march of progress. That there are no American traditions adverse to our conduct is clearly shown by the messages of Jefferson and Jackson.²

The nature of international law is no more clearly understood, no more clearly taught to-day than it was in the precincts of this college more than a century ago, when Professor Wilson directed attention to the distinction existing between the natural law of nations based on the obligations of nature and the conventional laws of nations which arise by consent evidenced by custom, treaty and usage. The learned jurist points out the clear distinction and suggested that this body of law should be distinguished by name from the other vague and imperfect moral law.

But a modern critic, reviewing the sentiments of Wilson, says it is a mistake to ascribe the basis of any law to consent. "This," says the reviewer, "is a favorite theme of theorists, but the contrary has been proven over and over again." It was a matter of gratification to me to listen to the address of that distinguished jurist, the late Lord Chief Justice of England, who addressed the American Bar Association on the topic "International Law and International Arbitration," 1896:

Lord Russell said: "As we are not to-day considering the history of international law, I shall say but a word as to its rise, and then pass on to the consideration of its later devel-

² The Messages referred to are those of March 4, 1805, and December 7, 1830, respectively.

opments and tendencies. Like all law, in the history of human societies, it begins with usage and custom, and, unlike municipal law, it ends there." He held that, like municipal law, international law arises by consent.

The desire of Wilson that another name should distinguish this conventional body of law governing the relations and actions of nations from the other indefinite moral code, has been fulfilled, and Bentham has the honor of suggesting the name International Law. By that name this conventional body is known.

Mediation and arbitration are the talismans of modern publicists. The schools of diplomacy are advocating and investigating this subject with commendable zeal and industry. Their zeal in ransacking the writings of foreign publicists and jurists is praiseworthy, but it does not speak well for our intelligence that so little comment is made upon the views and principles of one of the great fathers of the nation. The views the fathers held are important practical lights on the state of the science.

In reference to this subject Wilson says: "*The mediation* of a disinterested and benevolent power has been recommended likewise; but this mediation, though it enhances the merit and displays the beauty of the candid, the peaceful, the disinterested virtues, affords no reasonable security that the exercise of these virtues will be accompanied with the wished-for effect."

"*To arbitration* recourse has been advised: but to the institution of arbitrators the previous consent of the parties in controversy is requisite: and how, against the unwilling, is the award of the arbitration to be enforced?"

"What is next to be done? The same disposition or the same mistake, which on one of the sides must have given birth to the controversy, will probably communicate to it vigor and perseverance. Nay, that disagreement of mind between the parties, which must have taken place when the controversy commenced, is likely to be increased, instead of diminished, by the frequent, numerous and mutual irritations which will unavoidably happen in the prosecution of it. All the modes of adjustment which have hitherto been men-

tioned presuppose the reconciliation of the irritated minds. But must the peaceful adjustment of controversies between states, an adjustment so necessary and salutary to the human race, depend on events so very precarious, so very improbable? Must the alternative disputes and differences between the dignified assemblages of men known by the name of nations, be the same which are the prerogatives of savages in the rudest and most depraved state of society; voluntary accommodations or open war, or violent reprisals inferior in odium only to war? Individuals unite in civil society and institute judges with authority to decide, and with authority also to carry their decisions into full and adequate execution, that justice may be done and war may be prevented. Are states too wise or too proud to receive a lesson from individuals? Is the idea of a common judge between nations less admirable than that of a common judge between men? If admissible in idea, would it not be desirable to have an opportunity of trying whether the idea may not be reduced to practice?"

In this connection he refers to the sentiments expressed in the Alcoran; to the example of the Amphyction; to the Lacedemonian arbitration between Megara and Athens; to the offer of the Romans to arbitrate; and lastly to the same sentiments invoked by Lord Russell in the address above referred to, namely, the words of Thucydides, where he says: "It is cruel and detestable to treat him as an enemy who is willing to submit his case to an arbitration."

Now we may appreciate the expression in a letter of that great jurist and legal scholar, Simeon Baldwin, who writes of Wilson, "His arguments for the reasonableness and practicability of international arbitration were a century ahead of his time."

Passing from the field of international law, we may now touch briefly upon the general science of government before taking up the last branch of our theme.

While I would not make the claim broadly that he first published at large the fundamental principles of law and civil obligations as contained in the Declaration of Independence, I shall attempt to show that, twenty-three months before the Declaration of Independence, James Wilson published broadcast through the land the identical ideas in sub-

stantially the language in which they are proclaimed in the Declaration of Independence.

Let us pause for a moment to consider the conditions and circumstances under which this early declaration was made.

. . . I refer, of course, to the address to the American colonists, dated the seventeenth of August, 1774, in which Wilson investigates the then all-important question as to the extent of the powers of Parliament to legislate in matters pertaining to the colonies, and in which he reaches the conclusion, and declares it boldly, that Parliament has no authority to legislate over these matters; in direct opposition to the phrase of the declaratory act of Parliament. Every resident of the colonies was a subject of King George. The armies of America were not then arrayed against those of Britain. The pomp and circumstance of war did not animate and enthuse the patriotic bosom. Indeed the natural tendency was to dread an open rupture with the king. If any one longed for freedom from the yoke, it was not known. True, the intellectual struggle had been going on for a decade. The clash in Parliament had been open and bitter, but these did not involve treason. The die had not been cast. The king had been petitioned, Parliament had been remonstrated with, but as yet the allegiance to the crown had not been loosed, nor had any one suggested the idea that the king had abdicated his sovereignty by confederating with "our enemies."

What think you of the substance, the quality, the character of a man, who, under these circumstances, over his own signature, risks the swift punishment of an angry king, the angry oppression of an aroused Parliament, by publishing and scattering broadcast throughout the king's domains a declaration that Parliament had no authority to legislate for the colonies as to any matter, that the royal commissions based upon acts of Parliament or the advice of the king's ministers were unconstitutional and void, and that when a prince undertakes to enforce such unconstitutional measures his ministers are not raised to his estate, but he descends to theirs, and that those who are aggrieved by such action have a right to oppose the execution of such measures by force, to the extent of war if necessary? Did an English-

man ever escape the vengeance of an enraged Parliament? Even then the vessels of England carried in chains Americans for trial before the English tribunals. Think you, this bold Scotchman did not realize the enormity of his offense, the full measure of his danger? Ah, there was courage. There was an offering up of sacrifice. There was a risk of safety, security, ease, wealth, for posterity, and that the blessings of liberty might not perish from the earth.

In that address Wilson used this language: "All men are by nature free and equal: no one has any right to any authority over another without his consent: all lawful government is founded on the consent of those who are subject to it: such consent was given with a view to ensure and to increase the happiness of the governed, above what they could enjoy in an independent and unconnected state of nature."

With what justice is it claimed that the Declaration of Independence is the production of any individual, especially when it is known that the word "free" was used in the original draft, as a consequence naturally flowing from the "equally," but was stricken out because of the existence of human slavery. I would not claim that to any one American belonged the sole credit of promulgating the sentiment here brought forth. The idea of natural equality is older than America, is older than the French Revolution, is older than the British Constitution. Justinian, in his Institutes, says, "Wars arise, and in their train captivity, which is contrary to the law of nature, for by that law all men are born free." So we may merely notice that while the idea of the equality of men and the natural right to freedom, as well as the ideas of consent and representation, were not wholly unknown to the ancients, they had been ignored and immemorially violated.

It is now acknowledged that the American nation was the first instance in human history of a nation established in obedience to and in accordance with the fundamental principles of natural equality, and that as a consequence, consent was the basis of law.

We may not linger over this remarkable document, relating as it does to the British Constitution and the limitations upon the powers of Parliament, and the limits of pre-

rogatives. It foreshadows and enforces the fundamental principles of the American Constitution. It outlines the Declaration of July 4, 1776. Is there a prior claimant?

I shall pause to notice but one other contribution antedating the Declaration of Independence, and that is the celebrated speech in the convention of Pennsylvania in January of 1775, often spoken of as Wilson's speech in vindication of the colonies. And here, too, actual war had not begun. The guns of Lexington and of Concord had not sounded the opening of actual war.

In this address are recounted all the acts of oppression by the crown and the English legislature in such language as to clearly indicate its connection with the Declaration of Independence, promulgated eighteen months later. After recounting acts of oppression, he says, "Our opposition has hitherto increased with our oppression: shall it in the most desperate of contingencies observe the same proportions?"

"Let us pause, sir, before we give an answer to this question. The fate of us; the fate of millions now alive; the fate of millions yet unborn; depends upon this answer. Let it be the result of calmness and intrepidity; let it be dictated by the principles of loyalty and the principles of liberty. Let it be such as never in the worst of events to give us reason to reproach ourselves, or others reason to reproach us, for having done too much or too little. Perhaps the following resolution may be found not altogether unbefitting the present situation. With the greatest deference I submit it to the mature consideration of this assembly."

"That the act of the British Parliament for altering the charter and constitution of the colony of Massachusetts Bay, and 'those for the impartial administration of justice' in that colony for shutting the port of Boston, and for quartering soldiers on the colonists, are unconstitutional and void: and can confer no authority upon those who act under color of them. That the crown cannot, by its prerogative, alter the charter or constitution of that colony. That all attempts to alter said charter or constitution, unless by the legislature of that colony, are manifest violations of the rights of that colony, and illegal; that all force employed to carry such unjust and illegal attempts into execution is force without authority; that it is the right of British subjects to resist

such force; that this right is founded both upon the letter and the spirit of the British Constitution."

The war was inevitable. Its gathering clouds overshadowed the land. It broke, and its lightnings rent the British Empire, losing to her the only domain ever forcibly wrested from her power.

In the councils of the colonists no voice was more persuasive, no arguments more powerful, than Wilson's. The principles of human government, the principles of the English Constitution, the fundamental truths of liberty, were nowhere so clearly, so boldly, so fully examined, and so plainly illuminated as in the masterly discourses of James Wilson. The fiery rhetoric of Otis and of Henry might stir the heart and rouse the passions. This power had Wilson, but with it he had the unanswerable logic, the irresistible force comparable only to dynamic power, which made them irresistibly stirring, whether considered in the heat of debate or pondered in the quiet of the midnight chamber.

Wilson was, as you all do know, a signer of the Declaration of Independence, a member of the Continental Congress, a chosen friend of Washington and of Hamilton. From the opening of that struggle in 1775, to the close, few other thoughts and few other measures were considered than those which looked to the destruction of English armies, and the achievement of American independence. The Articles of Confederation were prepared and adopted. With these we have little to do because they were transient, tentative measures, serving the needs of the hour. But in the course of that struggle there is one measure worthy the attentive consideration of every student of American constitutional law. I mean the measure for the better securing of the finances of the new nation. Upon this basis the stability of a nation must depend. This measure was the incorporation of the Bank of North America, whose franchises were granted by the national Congress, and also received the sanction of the legislatures of some of the states. All of you who are advanced in the study of Constitutional Law will readily see that the national banks which were created under the national Constitution are but the descendants of this ancient instrument of credit.

It is here that I desire to begin the recital of the contributions made by Wilson to American constitutional law, because the principles involved in the creation of this measure lie at the basis of some of the most striking doctrines of American constitutional law. Wilson's argument on this question ranks easily with any constitutional argument ever delivered. This is a broad statement, but it is believed to be a conservative one and based on evidence that exists in such form that it cannot be lost, mutilated or changed.

You have heard much of the doctrine that the charter of a corporation constitutes a contract. No small part of the fame of Webster and of Marshall is based upon the putting at rest of that great principle of American constitutional law, that the contracts involved in a charter or a grant are alike protected by the obligation clause of the Constitution. The defence and final establishment of that great question is an act justly entitling those concerned to the admiration and encomiums of their fellow-citizens. But what measure of praise is due to him who advocates and first expounds the same great doctrine?

The first great question which he discussed is, Had the nation, in Congress assembled, a legal and constitutional power to incorporate the Bank of North America? Had this sentence been read to you, without premonition as to where it was uttered, you would have said it was the question involved in the case of *McCullough v. Md.*, and so it was, precisely the same, and the same reasoning which answered it in the former instance established it in the latter. But there is involved in that discussion a constitutional doctrine equally far-reaching and more potent in the affairs of this nation than that involved in the case of *McCullough v. Md.* On this depended the power to expand the borders of our nation and to survive the storm and stress of the late civil war, and the power to make the paper money of the United States a legal tender for debts.

Wilson states the proposition in this manner: "Though the United States in Congress assembled derive from the particular states no power, jurisdiction or right which is not expressly delegated by the confederation, it does not thence

follow that the United States in Congress have no other powers, jurisdictions or rights than those delegated by the particular states."

"The United States have general rights, general powers and general obligations, not derived from any particular states, nor from all the particular states, taken separately; but resulting from the union of the whole; and, therefore, it is provided in the fifth article of the confederation 'that for the convenient management of the general interests of the United States, delegates shall be annually appointed to meet in Congress.'"

"To many purposes the United States are to be considered as one undivided independent nation; and as possessed of all the rights, powers and properties, by the law of nations incident to such."

"Whenever an object occurs, to the direction of which no particular state is competent, the management of it must, of necessity, belong to the United States in Congress assembled. There are many objects of this extended nature. The purchase, the sale, the defence and the government of lands and countries, not within any state, are all included under this description. An institution for circulating paper, and establishing its credit over the whole United States, is naturally ranged in the same class."

If under the old Articles of Confederation this new nation possessed these inherent powers of expansion, and the power to create an institution for circulation of paper money and establishing its credit over the whole of the United States, it is but a mere corollary necessarily flowing from the reasoning to hold that the United States of America had not only power to create a bank and emit bills of credit, but to ascribe to them the character of legal tender. In this view the purchase of Louisiana and of Florida involved no strain on the Constitution. Viewed in this light, Justice Strong's opinion in the legal tender case does not appear novel when he says, "It would appear to be a most unreasonable consideration of the Constitution which denies to the government created by it the right to employ *every means not prohibited*, necessary for its preservation and for the fulfillment of its acknowledged duties." Likewise the language of Mr. Justice Bradley, in his concurring

opinion in the same case seems to be a mere repetition, with slight verbal change, of this argument of Judge Wilson. After expressing his views as to the nature of the government, Justice Bradley says: "Such being the character of the central government, it seems to be a self-evident proposition that it is invested with those inherent and those implied powers which at the time of adopting the Constitution were considered to belong to every government as such, and as being essential to the exercise of its functions."

I will simply pass this with the remark, Would any one familiar with the building of the American Constitution suppose for a moment that this doctrine of inherent power, about which so much had been said during the war for the Union, was a new invention which could be dreamed of only in time of war? What attribute of newness can be assigned to the doctrine promulgated by the great Chief Justice in *McCullough v. Maryland*?

Let us consider the other proposition concerning the nature of the charters and grants by legislative authority.

Among the reasons given why the legislature of Pennsylvania should not revoke the charter under consideration was that the act in question formed a charter or compact between the legislature of this state and the president, directors and company of the Bank of North America. The terms of the compact were fair and honest. While these terms were observed on one side, the compact could not, consistently with the rules of good faith, be departed from on the other. Answering the argument, Has not the state power over her own laws, may she not alter, expand, repeal at her pleasure, he said, after marking the distinction between legislative acts proper, and laws which vest or confirm an estate in an individual, instancing a law to incorporate a congregation or other society, "Surely it will not be pretended that after laws of these different kinds are passed, the legislature possesses over each the same discretionary power of repeal."

A law vesting or confirming an estate in an individual was involved in the case of *Fletcher v. Peck*. A law granting a franchise to, that is, a law to incorporate, a congregation or other society, was involved in the Dartmouth College case.

Now we may readily understand why James Wilson would naturally seek to have incorporated into the Constitution of the United States that clause which says that no law shall be passed impairing the obligation of contracts.

Whence this peculiar idea which regards the obligation of a contract as a thing apart from the agreement and which survives its execution? Search every musty nook and corner of the common law, and you will find no trace of it. That Wilson suggested it is now generally believed. Mr. Hunter, in his argument in the *Sturges v. Crowninshield* case, remarked of this clause:

“The judges of the state courts, and of this court, have confessed that there is in these words, ‘impairing the obligation of contract,’ an inherent obscurity. Surely, then, here if anywhere, the maxim must apply, *semper in obscuris quod minimum est sequimur*. They are not taken from the English or common law, or used as a classical or technical term of our jurisprudence, in any book of authority. No one will pretend that these words are drawn from any English statute, or from the states’ statutes, before the adoption of the Constitution. Were they then furnished from that great treasury and reservoir of our rational jurisprudence, the Roman law? We are inclined to believe this. The tradition is, that Mr. Justice Wilson, who was a member of the convention, and a Scottish lawyer, and learned in the civil law was the author of this phrase.”

Of Judge Wilson’s judicial opinions but one will be mentioned.

The vast and far-reaching consequence of the decision rendered in the case of *Chisholm v. Georgia* can scarcely be overestimated, and the greatest jurists have not been insensible of the magnitude of the question or the importance of the consequences which followed it. The fundamental question has always been recognized to have been as stated by Mr. Justice Wilson, “Does the Federal Constitution create a nation out of what was a confederacy?”

We who are living in the splendor of this full-grown republic and especially those who have been born since the last struggle, which was based upon the adverse proposition,

can scarcely comprehend that there was a time when the real nature of this Union was the question of controlling influence in the action which should be taken by the legislative and executive departments, and in the decisions which should be rendered by the judiciary.

No jurist or lawyer was ever more sensible of this fact than that great jurist whose centennial we recently so appropriately celebrated. Marshall says, in *McCullough v. Maryland*, "The counsel for the state of Maryland have deemed it of some importance, in the construction of the Constitution, to consider that instrument, not as emanating from the people, but as the act of sovereign and independent states."

After discussing the question, he says, "To the formation of a league such as was the confederation, the state sovereignties were certainly competent. But when, in order to form a more perfect union,' it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all."

Still more cogent is his expression in the later case of *Cohens v. Virginia*. He says, "America has chosen to be in many respects and to many purposes a nation." No one can fail to see the remarkable coincidence between this expression and that of James Wilson just quoted, "To many purposes the United States are to be considered as one undivided and independent nation."

In refuting the adverse contention, Marshall adds:

"This opinion has already been drawn out to too great a length to admit of entering into particular consideration of the various forms in which the counsel who made this point has, with much ingenuity, presented his argument to the court. The argument, in all its forms, is essentially the same. It is founded, not on the concrete words of the Constitution, but on its spirit—a spirit extracted, not from the words of the instrument, *but from his view of the nature of our Union*, and of the great fundamental principles on which the fabric stands. To this argument in all its forms

the same answer may be given. Let the nature and object of our Union be considered; let the great and fundamental principles on which the fabric stands be examined; and we think the result must be, that there is nothing so extravagantly absurd, in giving to the court of the nation the power of revising the decisions of local tribunals on questions which affect the nation, as to require that words which import this power should be restricted by a forced construction.'

The justice of Judge Cooley's observation on this subject is apparent. Of the case of *Chisholm v. Georgia*, he says:

"Justice Wilson, the ablest and most learned of the Associates, took the national view and was supported by two others. The Chief Justice was thus enabled to declare as the opinion of the Court that, under the Constitution of the United States, sovereignty belonged to the people of the United States. . . . After this clear and authoritative declaration of national supremacy, the power of a court to summon a state before it at the suit of an individual might be taken away by the amendment of the constitution—as was in fact done—without impairing the general symmetry of the federal structure, or inflicting upon it any irreparable injury. The Union might survive and accomplish the beneficent purposes entrusted to it, even though it might lack the power to compel the states to perform their obligations to creditors. We shall not pause to show—what is indeed self-evident—that the Union could scarcely have had a valuable existence had it been judicially determined that the powers of sovereignty were exclusively in the states or in the people of the states severally. Neither is it important that we proceed to demonstrate that the doctrine of an indissoluble Union, though not in terms declared, is nevertheless in its elements, at least, contained in the decision. The qualified sovereignty, national and state, the subordination of state to nation, the position of the citizen as at once a necessary component part of the federal and of the state system, are all exhibited. It must logically follow that a nation as a sovereignty is possessed of all those powers of independent action and self-protection which the successors of Jay subsequently demonstrated were by implication conferred upon it."

And now I am done with the mention of the principal ideas originated, advocated or expounded by James Wilson. If they are re-examined it will be found that they constitute the fundamental principles and principal doctrines upon which our system of jurisprudence is based. May I with diffidence express the belief that with the revival of the true study of jurisprudence now well begun, the importance of these contributions will be deemed of greater practical utility.

Do we who are guiding the thoughts of the young and teaching those who shall hereafter make and administer our laws place sufficient stress upon the value of the ideas of those who built the nation? They were the master spirits. On their judgment depended the choice or rejection of legal principles—and the practical question with us is not so much what Grotius or Locke or Coke or Bacon taught, but what of the ancient learning met the approval of the fathers—for, as we well do know, the stone which the builders of the olden time rejected became the keystone in the arch of the republic.

We are enjoying the blessings of their achievement, our prosperity and happiness are their glory.

Among them all there is perhaps one name more worthy, but after him, among the choice spirits of this new nation, who stood like corner-stones against whom the waves of danger dashed and broke, no other man was more honored or more worthy of it than James Wilson. How long, oh, how long, shall the pages of a foreign author say of him and of us, "He was one of the great luminaries of his time whom subsequent generations of Americans have failed to do full justice."

James De Witt Andrews.